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Ethics: Professionalism, Craft, and Failure

BY JAMES R. ELKINS*

I. PROFESSIONALISM: THE STANDARD ACCOUNT

Professionals shape and structure our understanding of human experiences. Physicians attend to illness and, through “medical notions” of curing and healing, implicitly shape our understanding of health.¹ Efforts to rid ourselves of disease and illness, or at least their symptoms, are mediated by the physician and the practice of medicine within hospitals. Lawyers draft our wills and contracts and represent us in trials. More importantly, lawyers provide the framework within which our understanding and perception of conflict, fairness, equality and social justice take on personal meaning. Claims to justice are filtered through the prism of law and legal practice. Conflicts and attendant concerns about rights and duties are adjudicated with the help of lawyers in the “theatre of adversity” we call trials.

In structuring and defining human experience, the professions play an integral role in the delineation of experience as good/bad, healthy/sick, or legal/illegal. It is in this shaping, this normative rendering of experience, that professions take on a moral/ethical perspective.

It is difficult, and perhaps futile, to talk about social values such as justice and health without reference to those individuals who make their life's work administering to such concerns. In the world of medicine and physicians, and in the world of law and lawyers, there develops a highly refined sense of mission,

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¹ See generally W. ARNEY & B. BERGEN, *MEDICINE AND THE MANAGEMENT OF LIVING: TAMING THE LAST GREAT BEAST* (1984).

practice and social utility, a sense which we have come to call "professionalism."

This essay focuses on one part of the "culture of professionalism"²—the moral/ethical dimension of professional life—and how our sense of professional ethics, particularly legal ethics, is shaped and deformed by what might be called the standard account of professionalism. The essay suggests that contemporary notions of professional ethics among lawyers and in legal education parallel the theory of professionalism drawn from the literature on the sociology of professions.³ This "sense of professionalism" strongly influences the social and political aspects of professional work and provides a ready-made structure within which the "felt-experience" of professional life can be organized. The lawyer's (and law student's) sense of professionalism becomes a rather prominent part of the lawyering ethos, an ethos which lays claim to the belief that professional work is guided by an ethical sentiment which protects the public and ensures that the profession acts in the public interest.

Professionalism is a feature of the lawyer's world-view⁴ because it is a set of fundamental beliefs which provides a frame

² See generally B. BLEDSTEIN, *THE CULTURE OF PROFESSIONALISM* (1978).

³ When lawyers and law teachers attempt to explain the nature of the legal profession they inevitably turn to sociological accounts. See, e.g., McKay, *The Future of Professional Independence for Lawyers*, in *THE LAWYER'S PROFESSIONAL INDEPENDENCE* 39, 40 (ABA 1984).

⁴ One commentator has argued that it is the lawyer's "dislike of vague generalities, the preference for case-by-case treatment of all social issues, the structuring of all possible human relations into the form of claims and counterclaims under established rules, and the belief that the rules are 'there' that constitute a legalistic world view." See J. AUERBACH, *UNEQUAL JUSTICE* 10 (1976). Similarly,

[w]hen we accuse someone of being legalistic, we suggest an excessive zeal for purely formal details which becloud rather than clarify the *real* issue. The legalist is someone who is lost among the trees and cannot *or will not* consider the overall shape of the forest. So it is a sense of willful closure together with an obsession for procedure and minutiae that we associate with the law game.

S. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 153 (1974) (emphasis in original). See also J. SHKLAR, *LEGALISM* 1 (1964) (arguing that legalism has a moral/ethical dimension); R. UNGER, *KNOWLEDGE AND POLITICS* 75 (1975) (legalism described as "a way of thinking about social life, a mode of consciousness").

Legalism has come under increasing criticism for "its role in maintaining oppressive social conditions and for [its] exceeding narrowness . . . as a world view." D'Errico, *The Law Is Terror Put Into Words*, in 2 *LEARNING AND THE LAW* 39, 40 (1975-76). On the conservative nature of legalism, see Wasserstrom, *Postscript: Lawyers and Revolution*, 30 U. PITTS. L. REV. 125, 129 (1968-69).

For a discussion of legalism in legal education, see J. AUERBACH, *supra*, at 276; Elkins, *A Humanistic Perspective in Legal Education*, 62 NEB. L. REV. 494, 509-13 (1983).

of reference and an orientation for day-to-day decisions in the practice of law. Professionalism conveys a sense of how work is to be done in the most pragmatic sense. At the same time the lawyer's world-view serves as an ideology—that is, the fundamental tenets and basic assumptions which provide a “deep structure” for professional practice, a structure which operates in much the same fashion as grammar does for language.⁵ Ideology is that part of our belief system that lies beyond question. The power of an ideology over professionals comes from the fact that its underlying tenets and assumptions are taken for granted and go unexamined.⁶

In the ideology of professionalism, more is better. If the profession is in trouble because individual lawyers provide inadequate services, misrepresent their clients, or abuse their responsibility through incompetence and negligence, then the cure is greater professionalism. If the profession is in trouble because it promotes the interest of the individual, pays too little attention to community and society, and ignores the harm that individuals are willing to perpetrate in pursuit of their own self-interest, then the cure is greater professionalism. How we are to resolve what are clearly social issues by more professionalism is unclear.

A fundamental tenet of professionalism is that an individual's failure to adhere to the highest standards or to adequately take into account the social and philosophical dimensions of his or her professional work is personal and idiosyncratic to that individual. Whenever larger numbers of professionals persistently act in a way that calls attention to the profession, they hear a call for more stringent standards or regulatory efforts to secure compliance with existing standards and norms.

⁵ For an account of ideology in the professional life of the lawyer, see Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 Wis. L. Rev. 29.

⁶ While “the legal view is no more narrowing than any other unidimensional explanation of the world, [it is] more deluding than some world views [because of] its covert character.” SCHEINGOLD, *supra* note 4, at 161-62. More specifically,

[l]aw professors and lawyers do not believe that they are either encumbered or enlightened by a special view of the world. They simply feel that their legal training has taught them to think logically. In a complex world, they have the intellectual tools to strip a problem, any problem, down to its essentials.

Id. at 161.

These notions of professionalism are closely related to what might be called a "standard account" of professions found in sociological literature.⁷ We begin with the fundamental notion that the practice of law is not simply an occupation: to become a lawyer is to become a member of a profession. From sociologists, and from our own personal experience, we learn that professionals are granted special status in contemporary society, and that professionals frequently acquire prestige, status and power. It follows that being a professional, and being seen by others as a professional, significantly influences the way we see ourselves and the way we work. Professional work is desirable in contemporary society, both for the status that one gains and for the sense that one is doing something worthwhile for others and for oneself.

A profession requires its initiates to undergo rigorous training whereby they learn a body of knowledge and develop the skills to apply that knowledge in order to solve problems and help those who utilize their services.⁸ Professionals are thought to have a superior understanding because of their formal education which focuses on a limited area of knowledge and is

⁷ The sociological account of the professions was first explored by Talcott Parsons nearly a half century ago. See Parsons, *The Professions and Social Structure*, 17 Soc. FORCES 457 (1939). The subsequent literature has not varied substantially from Parsons' original work. See, e.g., E. FRIEDSON, *THE PROFESSION OF MEDICINE* (1970); E. HUGHES, *MEN AND THEIR WORK* (1958); Cogan, *Toward a Definition of Profession*, 23 HARV. EDUC. REV. 33 (1953); Goode, *Community Within a Community: The Professions*, 20 AM. SOC. REV. 194 (1957); Goode, *Encroachment, Charlatanism, and the Emerging Profession: Psychology, Medicine, and Sociology*, 25 AM. SOC. REV. 902 (1960); Greenwood, *Attributes of a Profession*, 2 Soc. WORK 44 (1957); Wilensky, *The Professionalization of Everyone?*, 70 AM. J. SOC. 137 (1964).

Parsons and other sociologists have focused on the legal profession. See, e.g., T. PARSONS, *A Sociologist Looks at the Legal Profession*, in *ESSAYS IN SOCIOLOGICAL THEORY* 370-85 (1954); Heinz & Laumann, *The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies*, 76 MICH. L. REV. 1111 (1977-78).

In recent years, a body of literature which is more critical of the professions than the traditional sociological accounts has emerged. See, e.g., B. BLEDSSTEIN, *supra* note 2, at 334; M. LARSON, *THE RISE OF PROFESSIONALISM* (1977). The critical perspective has also focused on the legal profession. See, e.g., J. AUERBACH, *supra* note 4; J. NOONAN, *PERSONS AND MASKS OF THE LAW* (1976); S. SCHEINGOLD, *supra* note 4.

⁸ It has been suggested that the student learns more than a body of knowledge and a world-view, she also learns her place in the social hierarchy. See Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 40-61 (D. Kairys ed. 1982). See also Pickard, *Experience as Teacher: Discovering the Politics of Law Teaching*, 33 U. TORONTO L.J. 279 (1983).

joined with training and experience in the utilization of that body of knowledge. Professions are charged with the responsibility of ensuring the quality of their work and ensuring that members of the group act, as best they can, in the public interest. As a reflection of this social responsibility, the profession promulgates standards of performance and enumerates the duties of the professional. These standards and duties are embodied in an "ethical code" which serves as a sign of responsibility to those outside the profession, as a guide to normative conventions, and as an objective standard for sanctioning the wayward.⁹

The practice of law has for many years been the sole province of professionals. Professionals impress upon the public the view that technical and ethical problems within their realm of expertise must be treated only by those who have received appropriate certification.¹⁰ Certification comes only after the aspirant has completed the training and education necessary to master the body of knowledge and skills associated with the discipline. By assuming the responsibility for certification, licensing and policing against unauthorized practice of the profession's skills, the profession by governmental and social sanction controls the training programs, certification procedures, and mechanisms for regulation and punishment. Consequently, the mark of profes-

⁹ For a critique of professional ethics codes, see Teschner, *Lawyer Morality*, 38 GEO. WASH. L. REV. 789, 790-99 (1969-70). On the relationship of the lawyer's ethical code to the making of moral decisions, see *Essay: Three Discussions of Legal Ethics*, 126 U. PA. L. REV. 452 (1977-78). See also Flynn, *Professional Ethics and the Lawyer's Duty to Self*, 1976 WASH. U.L.Q. 429, 442 (arguing that to treat the Code of Professional Responsibility as describing the lawyer's ethical duties retards a student's ethical development); Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977); Note, *The Lawyer's Moral Paradox*, 1979 DUKE L.J. 1335, 1346-49.

¹⁰ The legal profession justifies this view as follows:

The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services. Because of the fiduciary and personal character of the lawyer-client relationship and the inherently complex nature of our legal system, the public can better be assured of the requisite responsibility and competence if the practice of law is confined to those who are subject to the requirements and regulations imposed upon members of the legal profession.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-1 (1979) [hereinafter cited as MODEL CODE]. See also Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 UCLA L. REV. 438, 439 (1964-65) ("The condemnation of the unauthorized practice of law is designed to protect the public from legal services by persons unskilled in the law.").

sions and professional work is autonomy.¹¹ Independence of judgment is a mark of integrity in professional life.¹²

Autonomy affords practitioners the opportunity to express and to take responsibility for a social and political vision of the world, to reflect concerns which extend beyond the immediate problem. While the possibility for expression of social and political concerns exists, the exercise of the possibility is limited, often rather severely, by competing professional norms.¹³ As a profession we have not celebrated the efforts of some among us to hold themselves out as "public interest" lawyers. There is, at present, no shared consensus within the profession as to when lawyering is in the public interest.

To be autonomous in one's work and to have status within society helps the individual account for and learn to accept the feelings of self-worth which go along with membership in a profession. Just as the standard account of professionalism mediates our vision of ourselves as social and political actors, it provides a prism through which an individual lawyer can see oneself, both as a professional and as a person with concerns and hopes which extend beyond professional life.

¹¹ One attorney's recent statement demonstrates a high, perhaps obsessive regard for autonomy: "The professional independence of the lawyer has, since early Rome . . . , been considered a keystone of any system of justice. . . . The professional independence of the practicing lawyer is the single most important element in providing the legal profession with its strength, character, and integrity." Brown, *The Decline of Lawyers' Professional Independence*, in *THE LAWYER'S PROFESSIONAL INDEPENDENCE* 23, 24 (ABA 1984).

¹² See *id.* The MODEL CODE admonishes attorneys to exercise "independent professional judgment" on their clients' behalf. See MODEL CODE Canon 5 (1979).

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

MODEL CODE at EC 5-1.

¹³ See, e.g., MODEL CODE EC 8-6:

While a lawyer as a citizen has a right to criticize [adjudicatory] officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

Id. See also ABA Comm. on Professional Ethics and Grievances, Formal Op. 192 (1939) ("[A]n attorney holding public office should avoid all conduct which might lead the layman to conclude that the attorney is utilizing his public position to further his professional success or personal interests.").

That society is ambivalent about the status and prestige of lawyers serves only to reinforce the lawyer's stalwart resolve to maintain status in the face of a public that misunderstands the nature of professionals' work. The public's lack of understanding is attributed to its lack of knowledge and its inability to see that professionals adhere to values which non-professionals confuse with self-interest. The standard account of professionalism would have us believe that others can neither truly understand nor evaluate our work, and consequently, that they can never overcome their ambivalence about the status that we have in society.

Professionalism makes possible the belief that professionals make the world work, if they do not in fact make it a better place to live. Lawyers tend to view themselves as making a contribution to society, whatever their political or social perspective. The effect of the ideological underpinnings of professionalism is that those who practice law claim that their work is by its nature, in and of itself, a contribution to society. The standard account of professionalism supports and reinforces, if it does not actually promote, the belief that all professionals as a group preserve and promote the social welfare.

Professionalism encourages the belief, at least among professional elites, that the profession is vitally concerned about the moral/ethical dimension of professional practices. The social justification for professional autonomy and self-regulation is that there is an "ethics" which guides our practice. We give notice to the world that we are governed by the "higher calling" of professionalism¹⁴ and evidence that notion by the voluntary imposition of standards upon ourselves. Our concern for the moral/ethical dimension of professional practice is thought to be shown in the existence of an "ethical code."

There is nothing dramatic and little that is new in this "sociological account" of the professions. And yet, this view of the professions mirrors so completely what we have come to think of as ethics in the professions. Sociology has not only provided us with an account of the social organization of lawyers, but more significantly, the sociological account has become

¹⁴ The idea of law as a "calling" can be a way of getting beyond narrow conceptions of professionalism. See, e.g., Bresnahan, *Theology and Law: A Deeper Understanding of Vocation*, 7 CAP. U.L. REV. 25 (1977-78).

a view that we use to justify ourselves and our work to others, and to ourselves. The sociological account gains currency then, not only among sociologists who study the professions, but in the profession, among professional elites, and among those who constitute the practicing bar.

II. AN ETHICS OF PROFESSIONALISM

One of the significant developments in education in the last decade has been the focus on values and ethics. Professional schools do not exist in a social vacuum; consequently, law schools have begun to require "legal ethics" as a part of the curriculum. Further, there has been substantial concern within the legal profession as to the nature of legal ethics and how it can best be taught to students.¹⁵ But what does the concern mean? Does it demonstrate the commitment of the legal profession and legal educators to make the moral/ethical dimension of professional life an integral part of legal education? The current interest in ethics in the professions is best understood by taking a closer look at what is meant by "applied ethics" and how it embraces the standard account of professionalism derived from sociology.

All of this talk about ethics tends to take a particular form: our talk about ethics in law and professional life is an ethics in service of professionalism. It will be my argument that legal ethics must free itself from the standard account of professionalism. There is little impetus to do that so long as professionalism is viewed as an unmitigated good both for the individual and for society. When the notion of professionalism is sacrosanct, as it is today, we have difficulty imagining an ethics divorced from the standard account.

The sociological description of professionalism suggests that an ethical mandate is fundamental to the very concept of a profession. Lawyers cannot escape ethics because ethics lies at

¹⁵ See note 19 *infra*. If ethics is to be applied, then it must be taught and learned. The recent interest in "applied ethics" reflects a new emphasis on values and ethics in education. See *EDUCATION AND VALUES* (D. Sloan ed. 1980); *ETHICS TEACHING IN HIGHER EDUCATION* (D. Callahan & S. Bok eds. 1980). See generally HASTINGS CENTER, *THE TEACHING OF ETHICS IN HIGHER EDUCATION* (1980).

The notion that ethics is a special field of study, a discipline with its own language, body of knowledge and methodology, has been encouraged by a recent report on ethics in higher education. See HASTINGS CENTER, *supra*.

the core of professionalism. We may disguise ethics in the name "professional responsibility," in the law of lawyering,¹⁶ or in professional malpractice, but it is ethics nonetheless. When we talk about ethics, including legal ethics, we are talking about professionalism.

The idea of "applied ethics" looks substantially different in law than in medicine. In medicine, ethics provides the basis for debate and dialogue about the role of the physician, about the physician-patient relationship, and about the role of physicians and of medicine in the broader philosophical¹⁷ and spiritual¹⁸ worlds that we inhabit. In the legal profession our sense of applied ethics has been substantially more constricted. We have indeed recognized the obligation to teach something called "legal ethics,"¹⁹ but we misconstrue the obligation as a duty simply to convey information and knowledge about the ethical code of professional practice. The view that legal ethics is the study of an ethical code or a study of the law of lawyering is a perfect example of how the ideology of professionalism transforms ethics so that it supports traditional approaches to lawyering instead of becoming the basis for a critical perspective on lawyering. In actual practice, the ethics that gets applied is an ethics of professionalism, an ethics that buttresses and reinforces existing views of the lawyer as a Sophist, as a "hired gun" who disregards the harm perpetrated in the name of professionalism. At best, the ideology of professionalism promotes reform while legitimating an entire structure of normative conventions that are only nominally related to ethics.

When we look for an ethics to apply in law, we tend not to reach out very far. It is not ethics in the sense of a general,

¹⁶ A blatant and arguably outrageous example is L. PATTERSON, *LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY* (1982).

¹⁷ The literature suggests that medical ethics has a stronger philosophical foundation than does legal ethics. See, e.g., R. VEATCH, *A THEORY OF MEDICAL ETHICS* (1981); Hunt & Arras, *Ethical Theory in the Medical Context*, in *ETHICAL ISSUES IN MODERN MEDICINE* 1, 1-48 (1977); Romanell, *Medical Ethics in Philosophical Perspective*, in *HUMANISTIC PERSPECTIVES IN MEDICAL ETHICS* 23-38 (1972).

¹⁸ See J. NEEDLEMAN, *THE WAY OF THE PHYSICIAN* (1985).

¹⁹ The literature on pedagogy and legal ethics is extensive. For a succinct review of the history of ethics in the law school curriculum, see M. KELLY, *LEGAL ETHICS AND LEGAL EDUCATION* (1980). Pedagogical and philosophical issues in the teaching of legal ethics are explored in Elkins, *Moral Discourse and Legalism in Legal Education*, 32 J. LEGAL EDUC. 11 (1983); Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 AM. B. FOUND. RESEARCH J. 247 (1982).

universalized, philosophical ethics that we bring in to apply. Rather, our present application is of a more limited, bastardized version of ethics, an ethics culled from the ethos of professionalism. It is not the ethics known by philosophers and theologians,²⁰ but an ethics of ethos, an ethics formed from the normative conventions and practices of those who do professional work. It is an ethics of work rather than an ethics of craft.

"Applied ethics" as transformed by the ideology of professionalism reflects a routinized, secularized professional training curriculum in legal education,²¹ which in turn reinforces a simplified ethical view of professional life. The focus on knowledge and training, on professional skills, techniques and strategies, becomes the basis for a legalistic world-view which in turn is translated into a form of discourse and a way of life. An "applied ethics" which promotes professionalism inevitably fails to convey to those becoming lawyers that something more than skill and competence is at stake.²²

An ethics of professionalism is characterized by its emphasis on ethical dilemmas and the use of rational, intellectual and cognitive problem-solving techniques to resolve these dilemmas. The explication and application of a set of ethical rules and principles to specific problems make the ethics of professionalism amenable to those with a legalistic world-view. In the rush to apply ethics to legal practice we overlook those metaphors and images closest to our own lives which reveal how the deeper

²⁰ Thomas Shaffer has written extensively on legal and professional ethics from a theological perspective. See T. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* (1980); Shaffer, *Christian Lawyer Stories and American Legal Ethics*, 33 *MERCER L. REV.* 877 (1982); Shaffer, *Henry Knox and the Moral Theology of Law Firms*, 38 *WASH. & LEE L. REV.* 347 (1981); Shaffer, *Christian Theories of Professional Responsibility*, 48 *S. CAL. L. REV.* 721 (1975).

²¹ See Elkins, *supra* note 4, at 509-13.

²² One of the few efforts to explore the moral/ethical dimension of lawyering skills is G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978).

Learning the moral/ethical dimension of lawyering and professional life poses a special problem—an epistemological problem. But is ethics to be learned the way we learn to be lawyers? Professional responsibility and ethical lawyering may require something more than simply *knowing about* ethics. One commentator has reminded us that "[u]nder the discipline of unity, knowledge and morality come together. No longer can we have that paltry 'objective' knowledge so prized by the academic specialists. To know anything at all becomes a moral predicament." W. BERRY, *THE UNSETTLING OF AMERICA: CULTURE AND AGRICULTURE* 47-48 (1977).

sense of trust,²³ caring²⁴ and love²⁵ can be deformed by the instrumental and pragmatic concerns of an "applied ethics."

Imagine hunting a fox, at night, by flashlight. You may see a lot of interesting things, experience surprise or fear, and have a good time, but it is unlikely that you will see a fox. "Applied ethics" may be a necessary and good thing, but there is little reason to delude ourselves with the belief that the light of an applied ethics course will ever reveal some fox called ethics. We have a tendency to treat ethics as if it were simply another source of light, by which we will learn to see in the dark. The ethics of professionalism dulls our ethical sensibility; it demeans and deforms by treating ethics as if it were a flashlight to be used on dark nights. An ethics of professionalism restricts whatever impact ethics might have by using it to put a little more light on our work and to simplify our ethical world by providing a set of rules that can be applied whenever an "ethical problem" arises. And we expect an ethics of professionalism will make possible the rationalization and reconciliation of the many cross-currents and contradictions that lie at the heart of professional life.

Professionalism masks the value dimension of particular practices, stances and goals. It allows the practitioner to take for granted that representing a diverse clientele with individual needs and concerns is good and will, at least in some final accounting, be viewed as serving the best interest of society. Equally fundamental, professionalism allows the practitioner to ignore or to leave implicit her social and political vision. If one has no predisposition to be explicit about the social world in which one lives, then membership in the legal profession provides a minimally adequate conception of a good society.

The ideology of professionalism makes it possible to believe that the practice of law is the embodiment of a moral life.

²³ On the issue of trust in the attorney-client relationship see Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015 (1981).

²⁴ On the possibility of an ethics of care, see C. GILLIGAN, IN A DIFFERENT VOICE (1981) (suggesting that women's sense of justice differs from that of men and that justice for women is more a matter of care and relations than of rights and principles). See also R. PIRSIG, *ZEN AND THE ART OF MOTORCYCLE MAINTENANCE* (1974) (on the obstacles to "caring" in contemporary culture).

²⁵ See Leleiko, *Love, Professional Responsibility, The Rule of Law, and Clinical Education*, 29 CLEV. ST. L. REV. 641 (1980).

Consequently, the ideology of professionalism is concerned about "ethics" only to the extent that it is possible to maintain and legitimate belief in professionalism. One commentator has argued that as a result of this belief, lawyers live in a simplified amoral universe.²⁶ For the most part lawyers do not find it necessary to engage in constant and daily re-examination of their practices and purposes, *because* they are professionals. An ethics of professionalism is an ethics that forgets itself.

The beauty of professionalism, for those who seek to live a simple moral life, is that self-examination is not required. And so the ethics of professionalism, left unchallenged by any sense of ethics beyond that which serves one's sense of professionalism, falls short of the widely-espoused philosophical imperative derived from Socrates (the patron saint of legal education) that one lead an examined life.²⁷ Lawyers live in a simplified amoral universe partly because they are not compelled by the ethics of professionalism to reflect on whether what they do is good. Ethics fuels the hope, and perhaps the illusion that a professional life is by its very nature an ethical one. An ethics of professionalism is an ethics of complacency, a complacency that embraces the existing professional ethos, an ethos that blinds us to what we do in the name of truth and justice.

III. BEYOND THE ETHICS OF PROFESSIONALISM

Ethics carries with it a long heritage and offers a mode of discourse that could provide a new frame of reference within the legal profession. To reach out and take account of something called ethics provides an opening for a more critical perspective. "Applied ethics" is a wonderful opening through which to bring in the critical reflection on professionalism which social critics and theorists have developed. As the critiques from outside gather force, and the internal cracks and strains become more obvious, the legal profession may find the voice of those who dissent from an unrestrained adversarial ethic, a voice of reason that speaks to the future.

²⁶ See Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).

²⁷ Some philosophers in applied ethics do take account of the Socratic dictum calling for self-examination. See, e.g., E. STEVENS, *BUSINESS ETHICS* (1979).

One of the most rudimentary elements in an ethics of care requires that we stand in the shoes of the other. The most alien other for an ethics of lawyering is the radical social critic who calls our professionalism into question and shows how we, as a profession, present a problem in securing the larger social good.²⁸

Seeing ourselves as professionals from the perspective of the radical social critic may not convince anyone to give up the practice of law or to drop out of law school. But such a perspective should provide a way of viewing ourselves which suggests the need for humility rather than the arrogance so commonly associated with professional life. And if we come to see ourselves as human beings, to recognize that professionalism is subject to question, and to accept that our social utility is in doubt, then we are in a better position to see ourselves doing the humble job of craftsmen. While we may see ourselves as doing socially significant work, as devoting our lives to worthy goals like justice, or ensuring that every man and woman shall have access to the courts, are we not also like the simple potter or weaver who tries to make objects that have a functional beauty?

I propose an alternative conception of ethics, an ethics which does not attempt to rationalize or justify professionalism. It is an ethics neither of rules and sanctions, nor of principles and reasoning,²⁹ but an ethics of searching, questioning and reflecting. It is an ethics of craft, an ethics attentive to failure as well as to success.

The ethics that I describe here is grounded in the lives that we live, lives that include boredom, disenchantment, alienation³⁰

²⁸ See generally I. ILLICH, *DISABLING PROFESSIONS* (1978).

²⁹ An ethics of professionalism derived from a framework of reason drives underground the inquiry into values. Inquiries into a discipline's values are discounted on grounds that objective, rational inquiry is not possible. Values, when viewed from the standpoint of scientific rationality, are simply "not the kind of entity to which the conception of rationality is applicable." Berlin, *Rationality of Value Judgments*, in *NOMOS VII: RATIONAL DECISION* 221 (1964).

Conversely, law is arguably no more objective and rational than is ethics. There is a growing body of literature which suggests that the objectivity of law is indeed an illusion. See, e.g., W. BISHIN & C. STONE, *LAW, LANGUAGE AND ETHICS* (1972); *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (D. Kairys ed. 1982).

³⁰ For a vivid portrayal of alienation in one lawyer's life, see C. REICH, *THE SORCERER OF BOLINAS REEF* 19-47 (1976). See also S. WISHMAN, *CONFESSIONS OF A CRIMINAL LAWYER* (1982).

and "burn-out."³¹ In contrast to an ethics of rule following, an ethics of craft returns to those conversations about the value of a professional life, to those dialogues in which we search for an ethical stance. To talk about lawyering and professional life from the value perspective says something about where we stand, how we experience the world, and how the world of our experience and professional life takes on moral consequences. I envision an ethics derived from those conversations³² and stories through which we "tell our lives." It is an ethics where conversation, ideals and visions become the basis for a good life. An ethics rooted in narrative and story,³³ in conversation and dialogue, is close to the lives that we live and see others living.

An ethics of dialogue is agonizingly slow to emerge, and it is not applauded by those whose lives are called into question. Moral discourse engages the professional in conflict and in the recognition that his views of the world can be problematic, with harmful consequences to those he seeks to help and to the social values he believes he promotes.

When we divorce ethics from the standard account of professionalism, we experience professional life as more difficult, complex and perplexing. Ethics does not, and cannot, simplify or make life easy. Ethics does not solve problems or "lighten the load." Greater ethical sensibility is inconsistent with the pleasures of certainty, security and contentment. When we apply ethics without the protective ideological shield of professionalism, we put our ideals and our way of life on the line. We discover, not clarity, but complexity; not reassurance, but anxiety. The ethics of professionalism protects us from the anxiety

³¹ See Gould, "Burnout": *Law and Disorder*, The Nat'l L.J., Apr. 30, 1984, at 1, col. 1; A. PINES & E. ARONSON, *BURNOUT: FROM TEDIUM TO PERSONAL GROWTH* (1981); J. EDELWICH, *BURN-OUT: STAGES OF DISILLUSIONMENT IN THE HELPING PROFESSIONS* (1980).

³² Similarly, philosophy can be viewed as a conversation. See R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 170, 371-72, 389-94 (1979). "To see keeping a conversation going as a sufficient aim of philosophy, to see wisdom as consisting in the ability to sustain a conversation, is to see human beings as generators of new descriptions rather than beings one hopes to be able to describe accurately." *Id.* at 378. Conversation is "the ultimate context within which knowledge is to be understood." *Id.* at 389.

³³ See S. HAUERWAS, *From System to Story: An Alternative Pattern for Rationality in Ethics and Story and Theology*, in *TRUTHFULNESS AND TRAGEDY* 15-39, 71-81 (1977); S. HAUERWAS, *A Story-Formed Community: Reflections on Watership Down*, in *A COMMUNITY OF CHARACTER: TOWARD A CONSTRUCTIVE CHRISTIAN SOCIAL ETHIC* (1981).

of choice,³⁴ from determining where we stand in regard to the work we do, and more significantly, from the work which we believe to be a worthwhile human endeavor.

Any ethics worth pursuing is difficult and demanding. In applying ethics we get ourselves into that space where our ideals come into conflict and where choice is necessary. Ethical choice calls our character into question,³⁵ and this calling into question perplexes and angers. To apply ethics to our professional work, we hold up a mirror to our own good intentions. When we look closely, we are likely to find self-deception³⁶ and wishful thinking.

We are unwilling to view ourselves critically so long as we can avoid it. There is no small amount of courage involved in learning the cost of the decisions we make and in discovering the effect of our views on those who most depend on us for comfort, help, service and love. Confrontation with oneself makes our self-deception and delusion obvious. And, as one commentator noted, "[c]ommunities [such as the legal profession] carry their heroes' point of view, but communities also deceive themselves and train their young in the skills of self-deception."³⁷

³⁴ Some moral philosophers, particularly existentialists, see choice as the core of moral existence. Existentialists see "being" as those "projects" which one lives out in her choices. Michael Maccoby expresses the point in socio-psychological language: "[W]e must choose who and what we will be and strive toward actualizing innate capacities for reason and love by overcoming greed and egocentrism, at the same time developing competencies that are socially productive and talents that are life enhancing." M. MACCOBY, *THE GAMESMAN* 241 (1976). See also E. MEEHAN, *VALUE JUDGMENT AND SOCIAL SCIENCE* 28 (1969) ("Every human action, including the act of doing nothing (often the most complex choice of all) implies a value judgment, whether or not the individual is aware of making it, and in fact even if the person thinks that none has been made.").

On choice and ethics, see R. NOZICK, *PHILOSOPHICAL EXPLANATIONS* 294-95 (1981); S. ROSS, *THE NATURE OF MORAL RESPONSIBILITY* 97-100 (1973); J. SARTRE, *EXISTENTIALISM AND HUMANISM* 28-32 (1948); Stack, *Kierkegaard: The Self and Ethical Existence*, 83 *ETHICS* 108 (1972-73). See generally Elkins, *The Examined Life: A Mind in Search of Heart*, 30 *AMER. J. JURIS.* _____ (1985).

³⁵ See Giegerich, *The Lawyer's Moral Paradox*, 1979 *DUKE L.J.* 1335, 1355-57. See generally Hauerwas & Shaffer, *Hope in the Life of Thomas More*, 54 *NOTRE DAME LAW* 569 (1979).

³⁶ See S. HAUERWAS, *Self-Deception and Autobiography: Reflections on Speer's Inside the Third Reich*, in *Truthfulness and Tragedy* 82-98 (1977); G. MURPHY, *OUT-GROWING SELF-DECEPTION* (1975).

³⁷ Shaffer, *Essay: The Moral Theology of Atticus Finch*, 42 *U. PITT. L. REV.* 181, 209 (1981).

The ethics that I envision is not a fox to be caught in the net of our legal education courses, the fox called ethics is at best a mythical beast. Ethics, like the fox, is crafty and elusive. It will not be easy to get beyond our sense of professionalism and the standard sociological account of professionals. Ethics, like the fox, leads in many directions and we may find that we know less about the beast than we at first thought. It is hard to admit that we have so much trouble caging this mythical fox called ethics. Unable to capture it, or forget it, the very core of our professional identity demands that we not give up the search. It is easy enough to become disappointed, discouraged and apathetic when we learn that we are not going to see the quarry. We go on the hunt, but we find no fox.

Ethics might better be imagined not as the fox but as the hunt. An ethics of talk, dialogue, story and narrative, an ethics found in the ever-present teaching and learning that comes from telling our lives is in many ways like the hunt. The idea of ethics as a never-ending hunt, as the pursuit of ideals which elude us, is a theme closer to the lives that professionals live. When ethics is the hunt, then it is our questions rather than our answers,³⁸ the process rather than the content, that form the basis for a moral life.

We have followed the fox called ethics and asked whether it has not led us astray. Ethics is not "out there" in some course or some ethical code. The fox has eluded us because what we seek is the essence of the hunt. Although we may imagine ethics as question, search or hunt, if we peruse the metaphor, ethics may turn out to be neither fox nor hunt, but the night in which the hunt takes place.

Legal ethics teachers may view their subject as an ethical code, the law of lawyering, or an understanding of a professional ethos. But an "applied ethics" that moves beyond the ethics of professionalism takes one into that inner subjective world in which one chooses and in which one sees the illusions and delusions upon which his professional life is based. If we talk enough about ethics, will we not find that the resulting sense of powerlessness to live out what we know to be right takes us into

³⁸ "The answers we carry about in our heads are largely meaningless unless we know the questions which produced them." N. POSTMAN, *TEACHING AS A CONSERVING ACTIVITY* 154 (1980).

the darkness which lies at the heart of professional life? Have we not followed our metaphor and its image to the point that we recognize that ethics is a study of the dark side of professionalism? Before these questions can be answered, it must be realised that ethics focuses on persons rather than rules, on lives rather than principles.

IV. AN ETHICS OF CRAFT

The first stage in imagining an alternative to an ethics of professionalism is to move professionalism off center stage and to think of our work as craft, as art as well as techne. While there is much talk of "training" lawyers, we know that professional work involves far more than that. While the professions involve practical, technical skills, they are also a life and practice of craft.³⁹ It is in the effort to join the practical and artistic work of the legal profession that craft becomes an appropriate and empowering metaphor.

Crafts historically were learned in communities and supported by a community, so an ethics of craft can be learned only through community. In craft professions such as law, a sense of community emerges from the notion that one "belongs" to the profession and "practices" its discipline. This sense of community is bounded by common knowledge and skills, and by a shared understanding that comes from undergoing a rite of passage with others.⁴⁰ Belonging to a community provides the professional with a sense of being a part of a communal tradition with accepted ways of doing the work, a customary way of standing together.⁴¹

What kind of community is the legal profession? What does it mean to be in such a community? How does the community

³⁹ See generally K. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* (1962).

⁴⁰ See Elkins, *Becoming a Lawyer: The Transformation of Self During Legal Education*, 66 *SOUNDINGS* 450 (Winter 1983). See also D. LIGHT, *The Nature of Professional Socialization and Its Effects on Practice*, in *BECOMING PSYCHIATRISTS* 308-19 (1980).

⁴¹ On finding common ground and standing together, the essays of Wendell Berry, a Kentucky farmer, poet, essayist, novelist, and cultural and literary critic, are instructive. See, e.g., W. BERRY, *STANDING BY WORDS* (1983); W. BERRY, *RECOLLECTED ESSAYS 1965-1980* (1981). See also W. BOOTH, *MODERN DOGMA AND THE RHETORIC OF ASSENT* (1974).

support (and undermine) our conversations about the moral/ethical dimension of a life in law? Vital as it is, community tends to get lost when we start talking about values.

The urge to form communities and the need to be in a community is at base an ethical impulse, a movement toward human togetherness with attendant concerns for others. Without communities we would have no need for responsibility. The care for others, and the harm that follows from being with others forms the "deep structure" of ethics.⁴²

Karl Llewellyn argued eloquently that legal education should be a foundation for a life in the practice of a craft and that law itself is a liberal art.

The truth, the truth which cries out, is that the good work, the most effective work, of the lawyer in practice roots in and depends on vision, range, depth, balance, and rich humanity—those things which it is the function, frequently the fortune, of the liberal arts to introduce and indeed to induce. The truth is therefore that the best *practical* training a University can give to any lawyer who is not by choice or by unendowment doomed to be hack or shyster—the best *practical* training, along with the best human training, is the study of law, within the professional school itself, as a liberal art.⁴³

While the study of law is rarely viewed today as a study in the liberal arts,⁴⁴ Llewellyn's concern is still viable. The problem is that we tend to view law more as technical training than as liberal art. An alternative, one which honors Llewellyn's view of legal study as a liberal art and yet recognizes the technical and practical aspects of lawyering, is the image of lawyers' work as craft.⁴⁵

⁴² See C. GILLIGAN, *supra* note 24; H. NIEBUHR, *THE RESPONSIBLE SELF: AN ESSAY IN CHRISTIAN PHILOSOPHY* (1963).

⁴³ K. LLEWELLYN, *supra* note 39, at 380.

⁴⁴ For an excellent demonstration of how the humanities can enrich the study of law, see J. WHITE, *THE LEGAL IMAGINATION* (1973); J. WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* (1984). See generally Elkins, *supra* note 4, at 494, 498-501.

⁴⁵ Once there was no divorce between art and craft:

[I]n medieval society, painters and sculptors as well as potters and weavers were members of craft guilds. A man *was* a carpenter, a painter, or a stonemason; his work, his way of life, was central to his identity and recognized as his means of centering and discovering himself. It was whole;

The notion of lawyering as craft reflects both the technical and artistic aspects, as well as the social and personal dimensions, of professional work and life. From the craft perspective, professional competence lies in the skilled ways in which talents, knowledge and skills are employed to resolve particular problems and to express a social/political vision in one's work. A recent study of corporate managers is illustrative. The study revealed that those who saw themselves as craftsmen had "a sense of self-worth based on knowledge, skill, discipline and self-reliance."⁴⁶ While the craftsman was interested in success and money, he was "motivated even more by the problem to be solved, the challenge of the work itself and his satisfaction [came from] creating something of quality."⁴⁷

An ethics of craft begins with the idea of skill, of knowing how to do something. In each discipline there develops an array of skills, abilities and competencies that become associated with the craft. We assume that lawyers will be able to marshal the most effective arguments on behalf of particular clients. These arguments will draw on a thorough understanding of the events that affect the client's claims, on the body of legal knowledge that might be applicable, and on the various strategies that can be employed on behalf of the client. And yet unless there is something more, these skills and competencies reflect little more than the service that a lawyer will provide for a fee. The rhetoric of professionalism has always assured us that there is more to lawyer's work than competence in the use of specific skills.

To view lawyering as an art-like craft has implications for the way we envision the skills, knowledge and ethics that we invoke in the name of professionalism. While autonomy is of central concern in the ethics of professionalism, mindfulness is at the heart of an ethics of craft. Mindfulness is reflected in

it was his religion, his relinking with his divine source.

Dooling, *Introduction to A WAY OF WORKING* at viii (D. Dooling ed. 1979). See also E. SCHUMACHER, *GOOD WORK* 122 (1980) ("In the process of doing good work the ego of the worker disappears. He frees himself from his ego, so that the divine element in him can become active. Of course, none of this makes sense if we proceed from the basic presuppositions of materialistic scientism.").

On lawyering as an art, see A. MACLEISH, *Art and Law*, in *RIDERS ON THE EARTH* 82-88 (1978).

⁴⁶ See M. MACCOBY, *THE GAMESMAN: THE NEW CORPORATE LEADERS* 43 (1978).

⁴⁷ *Id.* at 45.

craft as the skill of getting something done right and doing it well, as opposed to the mere act of completion or just getting it done. Mindfulness reflects an aesthetic sensibility (good taste) and an awareness of the consequences of doing work well; it makes quality the guiding force not only in the work, but in one's life.⁴⁸ The image of the lawyer as a craftsman suggests not only the ethos and ethics of professionalism with its emphasis on skills and competence but also a mindfulness—that is, a quality of doing work in a way that reminds us of the careful, creative, yet technically-aware craftsman.

Mindfulness means care, awareness and thoughtfulness, but it is not the same thing as purpose or competence. Purpose and competence suggest a linear dimension of work and life, purpose helps us to get from one place to another, from one case and one client to another. Mindfulness gives feeling and depth to the client and case at hand. The state of mindfulness gives us presence in the very moment at which we engage the client, in the moment of our choice to employ our skill and our knowledge one way rather than another.

The difference between the two dimensions can be seen as the difference between competence and care, between knowledge and awareness, and between efficiency and thoughtfulness. The difference is one between surface and depth, an ethics of professionalism as opposed to an ethics of craft. An ethics of craft gives depth to our sense of professionalism.

We know that educating students in the use of certain skills does not, in and of itself, lead to professional responsibility and ethical lawyering. The skills that one uses as a lawyer—interviewing, counseling, negotiating, writing and arguing—all have a moral dimension. We can talk about the application of these skills—about how a lawyer interviews and counsels a client, and negotiates on the client's behalf—not simply in the technical sense, but in the sense of relating to clients as persons, with respect for their feelings, autonomy and dignity. To talk about *how* skills are to be performed, to develop an ethics of craft as well as an ethics of professionalism, we must explore the underlying meaning and purpose of skills, both for those who have

⁴⁸ For one of the most engaging accounts of a contemporary life lived around quality see R. PIRSIG, *supra* note 24.

hope that a life of skill is worthwhile⁴⁹ and for those who rely on us to use skills on their behalf. "Skill, in the best sense, is the enactment or the acknowledgment or the signature of responsibility to other lives: it is the practical understanding of value. Its opposite is not merely unskillfulness, but ignorance of sources, dependencies, relationships."⁵⁰

In the mindfulness we exhibit toward skill and in the skill we make of mindfulness we create an ethical sensibility. This sensibility is created through the quality of our crafts and by sharing our craft mindfulness with others.

A. *A Person-Centered Ethics of Craft: An Ethics of Humility*

To imagine our professional work as craft joins us with those who work with their hands, those who sculpt, weave and whittle. In craft work there is a product, and we too often focus our attention on this end result. Some person stands before the product, a person who has imagined the result, who has acquired the skill, who has struggled with making things work, with failure and with self.

An ethics of craft must evoke an understanding of persons who make craft, and the mindfulness it entails, a life's work. We must find a way to imagine professional work as craft so that it embodies the connection of self and work, of mind and result. In *The Work of Craft*,⁵¹ Carla Neddleman has produced a series of meditations on the crafts of pottery, weaving and woodworking, traditional crafts which on first impression appear to have little resemblance to lawyering. It is not the commonality of skills, but the craftsperson's way of thinking about those skills that makes Needleman relevant to lawyers. Her meditations are richly suggestive for the craft of professionalism.

Needleman begins her meditations by questioning the relationship that exists between the work, in this case a pot that she has made, and herself. Lawyers can similarly ask what it means to write legal briefs or to argue a case in court. She puts the point directly:

⁴⁹ See Hauerwas and Shaffer, *supra* note 35, at 569.

⁵⁰ W. BERRY, *supra* note 22, at 91.

⁵¹ C. NEEDLEMAN, *THE WORK OF CRAFT* (1979). For a different approach to the same end—an embodiment of self in work—see A. MASLOW, *EUPSYCHIAN MANAGEMENT* (1965).

The question of my craft is the question of myself—Who am I?—a question the craft can help me to rediscover again and again. . . .

. . . .

What does it mean that I undertake to study *myself*? . . . Perhaps it can mean . . . that I extend myself into the craft, willing to sacrifice any of my opinions that experience proves false. I undertake to begin a conversation with the craft, to listen to it, to be taught by the effort to understand it. Perhaps through the exchange a richer way of experiencing will begin to take root in me.⁵²

The material we work with in our craft, the craft of law, is not only the law, our clients and their problems, judges and arguments in courts, but it also includes ourselves. Needleman sees self, herself, as one material of her craft: "The material, myself, that I have to work with constantly changes. It has qualities of clay, glass, metal, wood, wool; it is brittle, flexible, malleable, obdurate. It is as if the study of being human is the ultimate craft and all the craft reflections of it."⁵³

Needleman is in search of the attitude that accompanies craft, an ethical sensibility that recognizes but is not bound by a prevailing ethic. In contrast to collective professional attitudes—an ethics bound by ethos—Needleman focuses on how a person deals with self as she learns and uses craft skills. She illuminates the "interiority" of professional work, and recognizes how craft and profession are the work of soul. Needleman's meditations on craft suggest an ethics with soul, an ethics that moves the imagination of work from ethos, what everyone does, to some sense of how I do this work, how the work/craft emanates from some interior place called "I."

When we shift the emphasis from product to person, from the explicit work to the implicit feel of it, we find a self, a soul, at work. Part of what we see, hear and feel is that image of ourselves at work, of having the mindfulness that goes with attention to craft. One image that Needleman, as a crafts person,

⁵² C. NEEDLEMAN, *supra* note 51, at 21, 12-13. See also Dooling, *supra* note 45, at vii (suggests craft as a means of integrating human experience).

⁵³ C. NEEDLEMAN, *supra* note 51, at 12.

carries with her to the work is an ideal image of herself doing the work right:

I visualized myself becoming more and more proficient, learning from my mistakes and producing increasingly more beautiful pots. I imagined that I could be dedicated and serious and saw myself as if from outside, sitting at the wheel in a large, orderly studio filled with pottery in various stages of completion, my head bent in concentration, all my movements sure and purposeful.⁵⁴

We are at once more, less and otherwise different from this idealized image. To see how we are different from the image one must open oneself to what happens at work, and to the feelings that accompany the doing: the tension that one feels as the work begins, the wonder about how one comes to do the work and how one makes judgments as to when it is acceptable, the impatience in trying to get it right knowing that there is too little time, the care and concentration that goes into completing the work, and finally, the sense of satisfaction with the work that emerges. It is from this connection with self that craft and ethical sensibility emerge. Needleman says: "For me this is what it's like to work at a craft. This is what *really* takes place."⁵⁵

One sees the work and has a moment of honesty, a terribly short moment when one reevaluates the work and feels discomfort. "I sense . . . the need to decide whether I'm pleased or displeased with the pot, pleased or displeased with the way I worked at making it, pleased or displeased with myself as a potter, as a person. . . ."⁵⁶ But in order to know how to feel about the pot, about the work we do, we must know how to feel about our lives.

Just as we are blinded to the belief system embedded in professional ethos, craft skills can put one to sleep by the

⁵⁴ *Id.* at 13.

⁵⁵ *Id.* at 6 (emphasis in original). Another craftsman describes a similar experience:

As I work, I try to stay a little free, to watch, listen, feel. The work goes on and I am with it, but I also try to explore within that. I try to stay active, immediate, practical. I search for my relationship to the work, to matter, to the tool, to the hand, to myself, in this moment and no other.

Donner, *The Hand and the Tool*, in *A WAY OF WORKING*, *supra* note 45, at 30.

⁵⁶ C. NEEDLEMAN, *supra* note 51, at 5.

repetition that makes the work into ritual. In pottery, Needleman says, "[c]entering [the clay] can easily be done with the eyes closed."⁵⁷ It is a ritual. One comes to know how the centering feels, how the body responds, and how the clay and the hands react to each other. The ritual can lead to boredom and fatigue, but it also can "quiet the mind and bring the relaxed thought to attend to the sensations of the body."⁵⁸ The ritual of craft work makes possible more subtle attention to feelings such as wonder, happiness, inner peace and healing.⁵⁹

B. The Craft of Failure

When we pay attention to ourselves at work and imagine ourselves as craftsmen, we begin to see and experience the failures integral to craft. Detachment and alienation, despair and disenchantment happen to us *as* professionals. We seem to lose our sense of self when we become lawyers. We forget our belief system and our biases and we neglect social justice. These failures introduce us to the shadowy side of professional life.⁶⁰ These pathologies of professionalism have too long remained unnamed.

We pay too little attention to stories of failure in professional work. Failure is relegated to the study of professional negligence and the sanctioning of professionals who violate prescribed ethical rules or who engage in criminal conduct. The failures of professionals are no secret to the public, to those who make use of our skills. While embarrassment over the professional failure results in a proliferation of ethics courses, the courses hide as much as they reveal. We need something beyond "applied ethics." We need to find out where we went astray and what was forgotten as we became lawyers. It is time to pay close attention to what ails us. By naming the pathology—the losing, the forgetting, the detachment and the disenchantment—we point to

⁵⁷ *Id.* at 8. See generally M. RICHARDS, CENTERING IN POTTERY, POETRY, AND THE PERSON (1964).

⁵⁸ C. NEEDLEMAN, *supra* note 51, at 8-9.

⁵⁹ *Id.* at 9-10.

⁶⁰ This side of professionalism is reflected in accounts of its history. See, e.g., B. BLEDSTEIN, *supra* note 2. See also LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER AND THE COURTS (R. Lefcourt ed. 1971); RADICAL LAWYERS: THEIR ROLE IN THE MOVEMENT AND IN THE COURTS (J. Black ed. 1971); VERDICT ON LAWYERS (R. Nader & M. Green eds. 1976); WITH JUSTICE FOR SOME: AN INDICTMENT OF THE LAW BY YOUNG ADVOCATES (B. Wasserstein & M. Green eds. 1972).

what must be recovered.⁶¹ A sense of craftsmanship begins with humility, limitation and failure.⁶²

But what of the vision and ideals conveyed by a craft-profession? Do they wither while we search out and work with our failures? An education in failure does not undermine the ideal, it honors it: "[N]o ideal is invalidated by anyone's, or everyone's, failure to live fully up to it. . . ."⁶³ An education in professional failure would teach us about craft and how the ideal vision and the rhetoric of success push us toward the idealization of technique. Without a sense of failure, craft becomes obsessed with technique.⁶⁴

Failure is an integral part of craft and the ethos of craft:

There are times when the clay is too hard or too soft,
wedging tires me, . . . and I seem to have forgotten how to

⁶¹ As women find their way into the world of work there has been a willingness to explore and name their set-backs, false starts, and failures. See, e.g., *WORKING IT OUT* (S. Ruddick & P. Daniels eds. 1977).

⁶² C. NEEDLEMAN, *supra* note 51, at 13. Our best efforts may not ward off an ever lurking sense of failure:

For most of us, our abilities, our good looks and our social techniques—our pleasant, public-relations hellos, our ability to laugh at anybody's jokes, our capacity to hold conventional opinions and to never value or fight for any position in an argument too much—never seem quite adequate to ward off all the chances of failure.

J. HENRY, *ON SHAM, VULNERABILITY AND OTHER FORMS OF SELF-DESTRUCTION* 90 (1973). Similarly, the craftsman

always fails in some degree. Despite his experience, despite the sureness that he sometimes is able to reach and briefly hold, there is within him, as he works, a hesitation, a doubt, a fear. . . . This unsureness is necessary for the growth of both him and his craft. He endeavors to pay no attention to it but to remain at the boundary of what he must do. He cannot be certain of what he must do. He cannot be certain of the step until the movement is completed, until the step is done. He knows that he cannot know. But he continues with the movement and does not bend to his fear. Thus he is both master and apprentice in his work.

When he fails, the failure leaves its trace in him and a clearer perception. The trace remains for a time in his memory. . . .

He continues to have a need for failure. It is the stopping place, the ultimate reluctance of his effort to continue. As he works, his reluctance accumulates, his tenseness grows. He fails—and is able to start again.

Remde, *Close to Zero*, in *A WAY OF WORKING*, *supra* note 45, at 54.

⁶³ W. BERRY, *STANDING BY WORDS*, *supra* note 41, at 100.

When I spoke of pottery in idealist terms of myself as a Potter, I began to hear little voices telling me it wasn't quite true, and I was ashamed. I had begun to realize that the obstacles to living the vision were in myself and that they were not a matter of technique.

C. NEEDLEMAN, *supra* note 51, at 13.

throw. I overestimate the strength of the clay and the pot collapses. The next ball of clay accountably refuses to stick to the wheelhead. At last it does. I raise it into a cylinder and begin to shape it only to find a piece of sponge in the wall. I dig out the sponge and try to patch the hole—to no avail. Beginning with another ball of clay, I find that I'm using too much water, an indication to me that I'm not in control of the clay. I rush to center it, feeling how much time I've wasted, and have trouble. I don't like the sound of the bearing on the wheel and there seems to be a wobble at high speeds. I begin to make the opening before the clay is properly centered and when I pull it up the top is uneven. I cut it with the needle and when I pull it up again find I have to cut still more off the top. There is more clay discarded on the table than there is on the wheel. I try to breathe evenly and slow down, to imitate the precise movements of the days when everything goes right, but it's just an external imitation, no use, an obvious pretense. I'm aggressive, I attack the clay, can't do anything right, get tired, dirty, and miserable, produce two pots I know then and there I'm going to break up tomorrow, and stop for the day.⁶⁵

Needleman is unwilling to dismiss such an event, even though it is tempting to put it out of mind and concentrate on those days when all goes well. Such days are embarrassing, but they are part of the truth of any craft.⁶⁶ These days of failure make for honesty in a craft. They take us back to the beginning, show us how little we know, and bring a sense of humility, an attitude which is needed to offset the arrogance so common to professional work. Arrogance cannot be maintained in the face of honest admissions that we have days when we fail in our work.

Needleman argues that "[a] craft is, can be, an education in failure, an education in the attitude toward failure. . . ."⁶⁷ To study failure we must overcome the "sinking sensation" which comes with recognition that we have not lived up to an ideal. Failure teaches. "Failure is a beginning; failure is the spring-board of hope."⁶⁸ An education in failure is an antidote to the neurotic success drive:

⁶⁵ C. NEEDLEMAN, *supra* note 51, at 10-11.

⁶⁶ "[I]sn't the truth of my incompetence and how I react to it just as valuable as the truth about competence?" *Id.* at 11.

⁶⁷ *Id.* at 15.

⁶⁸ *Id.*

[N]eed for success . . . [is] a constrictive force that bars me from immediate participation in the moment as it appears, prevents the all-important conversation with the material of the craft, prevents openness of relationship, prevents a kind of quickness of response much swifter than the cautions of the mind. The need for success distorts pleasure, rendering acceptable only 'materialism,' the 'gimme' approach to everything from a well-made piece of work to a new feeling or sensation.⁶⁹

Failures instruct because they have a way of breaking through the ritual activity of craft. To experience failure is to recall craft as a human activity, and to realise how professional skills are linked to a self that must bridge the gap of doing and being.

We need a phenomenology of failure in professional life. Every pot is not a good one. But every failure is not an act of negligence for which the professional should be sanctioned or punished. We are each responsible and accountable for the failures which fall short of bad practice. The gray twilight world of these "responsible failures" calls for a pathologizing of professional work and professional life.⁷⁰

Psychologist James Hillman argues that pathologizing—staying close to our failures—reconnects us with soul.⁷¹ Hillman argues that it is "[w]hen you feel beaten, oppressed, knocked back . . . then something moves and you begin to feel yourself as a soul."⁷² Hillman suggests that when we fail and feel bad about our work, there is an opening for soul to come in. And when you let soul in

you start to stutter or you'll go around in circles or you'll be unable to elocute it in a way that does justice to it—you will be in half-darkness. . . . [The] point is that soul means infe-

⁶⁹ *Id.* at 16.

⁷⁰ It is in this gray area of responsible failures that Charles Bosk's study of surgeons is illustrative. Bosk asks: "How does the surgeon cope with the knowledge that his clumsiness, forgetfulness, or tardiness contributed to another's death and/or suffering? How does the individual surgeon accept this responsibility and yet not shrink from future action?" C. BOSK, *FORGIVE AND REMEMBER: MANAGING MEDICAL FAILURE* 4 (1979).

⁷¹ See J. HILLMAN, *ARCHETYPAL PSYCHOLOGY: A BRIEF ACCOUNT* 37-42 (1983); J. HILLMAN, *INTER VIEW* 11-26 (1983). See also J. HILLMAN, *RE-VISIONING PSYCHOLOGY* (1977); J. HILLMAN, *THE MYTH OF ANALYSIS* (1972).

⁷² J. HILLMAN, *INTER VIEWS* 11-12 (1982).

riority—something sensitive, something . . . well pathologized. Soul makes the ego feel uncomfortable, uncertain, lost. And that lostness is a sign of soul. You couldn't have soul or be a soul if you couldn't feel that you have lost it. The Person in the strong ego, as it's called, doesn't feel he's lost anything. . . . We have to concentrate on making soul out of the lost and interior conditions.⁷³

Hillman's notion of pathologizing takes us beyond the simple idea of failure. Pathology is not something that happens to us, or something we do, or a particular state. Hillman suggests that "its there all the time! The pathology is the place that keeps the person *in* the soul, the torment, that twist that you can't simply be naive, you can't simply go along in a natural way, that there's something broken, twisted, hurting, that forces constant reflection—and work."⁷⁴ To pathologize the profession is to seek its soul, to take account of the dark underside, the realm of strong personal feeling, the experience of going astray and failing. A pathology of professionalism seeks out the personal, human face of action and inaction, for these too are an integral part of professional life.

The professional self-image we promote in the profession and in professional education is built around a strong ego, an ego that fuses cognitive manipulation of knowledge with the skills of a "doing self," a heroic ego that denies defeat and failure. Ego consciousness promotes a traditional professional identity which walls off professional and personal selves, and diverts us from the reservoir of feelings and sentiments that make a person complex, rich and soulful as well as a human tool that performs professional services for a fee.

The idealized professional self-image is rooted in an omnipotence fantasy which resists the feelings and failures that make soul possible. The soul of professionalism comes from the interiority, the reflectiveness of a self that can feel the failing, the weakness, the uncertainty, the subjectivity and the "softness" which permeate professional work. In feelings of helplessness, powerlessness, inadequacy and the fear of failure lie both the pathology and the heart of professionalism. Pathologizing

⁷³ *Id.* at 17.

⁷⁴ *Id.* at 23.

professional work and professional life helps me extend myself into the craft and become a part of what I produce. In pathologizing professionalism we see how professional ethos and idealized images of lawyering are an incomplete vision, a vision without soul.

Craftsmanship is perverted by the obsession for techniques and strategies—"tricks of the trade." Although these strategies and tricks are contained in the notion of craftsmanship, but they are not the container itself—they are not craft. We need a better sense of what it means to work at a craft and to have craft to turn to. We should seek to become mindful of self as craftsperson. We will also need a sense of how failure is possible, the failure one experiences in infinite beginnings, in the pathology and craziness of professional work. It is then that we begin to see the deeper meaning of professionalism and the true task of applied ethics.

